Club Registers are produced with visitors' slips. There appears to have been no effort at all on the part of the police to check the persons arrested with lists of members of the Siong Yap Club, the M.C.A., or the Chamber of Commerce and those visitors properly introduced, or to see whether they were legally on the premises.

Having had the Register of the Club and the visitors' slips translated, I find that all except appellants Nos. 3 and 4 (women) and No. 26 are either members of the Club or were introduced by members on the 31st January, 1955. As to No. 4 appellant, it is apparent from the evidence that she was an employee and in spite of D. S. P. Pilus' evidence, was found in a room occupied by the M.C.A.

Further, the prosecution appear to have ransacked the premises irrespective of whether the exhibits belonged to the Club, the M.C.A., or the Chamber of Commerce, and seized many articles at random, including all the furniture in the front room. D. S. P. Pilus suggested that the electric bell was a contrivance by which the approach or entry of any person can be seen or ascertained by persons on the premises and that it was put there purposely for countering a raid. He later in cross-examination admitted that everyone entering the premises had to use it. I have seen the bell and it is quite an ordinary door bell or house bell.

In a case of this nature, where by doing an act a presumption under the Ordinance is raised against accused persons, if the prosecution have the evidence which rebuts that presumption in their possession to the knowledge of the accused persons, but do not use it, then I think it can be said that no presumption properly arises against the accused persons, as the prosecution have not brought out evidence in favour of the accused in their possession rebutting such presumption which they should have done.

In spite of the finding of the learned Magistrate, I cannot find that there is any evidence of habitual gaming — the mere fact that one or two persons, not members, went to the premises and stated that they were allowed to play "Pai Kow" once or twice does not in my view prove that habitual gaming was being carried on — and the presumption which the learned Magistrate found to have arisen did not, to my mind, arise at all.

In cross-examination D. S. P. Pilus stated that he recorded an information on oath on 21st January, 1955. This was not produced by the prosecution as an exhibit. It was apparently on this information that the premises were entered on 24th January, 1955, by A.S.P. C. M. Roberts (P.W. 10) who said the raid was unsuccessful. It therefore seems that D. S. P. Pilus was under the impression that on any sworn information, not produced in court, he could at any time in the future raid premises. I am in some doubt as to whether this is so. No search warrants were produced in court and it would be interesting to know if in fact the same search warrant was used on the 24th and 31st or, for that matter, how many were issued on the information of the 21st January, and on what dates and to whom. These should have been produced by the prosecution to show their right of entry into the premises, but were not produced.

As I have said, the whole proceedings, including the investigations, were far from satisfactory. From the evidence which was before the Court, it seems clear that all persons actually playing "Pai Kow" were members of the Club or visitors who had been introduced in a proper manner; the remainder appear to have been sitting in another room taking no part in the game.

I think that on the very scanty evidence before him as to the habitual gaming on the premises, had he had the evidence disclosed in the documents produced (but not translated), the learned Magistrate would not have found that a sufficient case had been made out to warrant calling on the appellants for defence or, if he did so, he would have misdirected himself as to the presumptions relied on by the prosecution having been properly raised by the evidence before him.

The appeals are allowed and the fines will be refunded to the appellants and all exhibits returned to the persons from whom they were taken.

Appeal allowed.

Solicitors: *De Souza & Abishega-Naden.*

LEW CHEOK HIN v. REG.

[A. Cr. J. (Taylor J.) April 3, 1956]

[Singapore — Magistrate's Appeal No. 243 of 1955]

Criminal Procedure Code, 1955, ss. 166 and 168(2) — When a person charged with one offence can be convicted of another without amendment of charge — Conviction on a "minor" offence — Penal Code ss. 417 and 420.

The accused in this case went to a jeweller's shop on February 19, 1955 and took a pair of diamond bracelets, worth over $4,000, on approval. On the same day he took a bracelet worth nearly $5,000 from another jeweller, on approval. On 21st he took another pair worth about $3,700 from a third shop, also on approval. On the following day he bargained with each jeweller for a small discount and completed the purchase. The sales were ostensibly for cash but in each case by a feigned mistake as to the date, he induced the vendor to accept a cheque post dated to February 24, 1955. The

state of his bank account was such that the accused could not possibly have thought that any of the cheques would be honoured unless, on the intervening day, he paid in a very substantial sum. On February 22, 1955 he pledged all the jewellery to three separate pawn-brokers, to one of whom he gave a false name and another a false address; he did not pay any part of the proceeds either to the bank or to the vendors. All the cheques were dishonoured. Complaints were lodged by the vendors and the police traced the pledges.

The accused was tried on three charges of cheating under section 420 of the Penal Code, each of which alleged that he obtained delivery of the jewellery by tendering a false cheque. At the end of the case for the prosecution, counsel for the prosecution submitted that the offences proved were cheating under section 417 of the Penal Code. The learned District Judge convicted the accused under that section and in his grounds of judgment he stated that he found that the accused had deceived each vendor on the 22nd by falsely representing that he intended to pay for the bracelets and had thereby dishonestly induced the vendor's consent to his retaining them. The learned District Judge considered that this constituted an offence under section 417 of the Penal Code, that such an offence is "minor" as compared with one under section 420 of the Penal Code and that he could therefore convict under section 417, without amending the charge, by virtue of section 168(2) of the Criminal Procedure Code.

Held: (1) section 168(2) of the Criminal Procedure Code could not be used to justify the conviction in this case, as the false representation of which the accused was convicted under section 417 of the Penal Code was quite different from the one in the charge under section 420 of the Penal Code to which he had pleaded; (2) the conviction cannot be supported under section 166 of the Criminal Procedure Code, as although the unframed charge under section 417 of the Penal Code was available in this case from the start, the evidence was not presented in such a way as to raise all the same issues of fact as could have been raised had the unframed charge been framed and trial claimed on it; (3) the charges in this case could and should have been amended by the trial Court at the close of the prosecution.

Cases referred to:—

(1) *Lau Chuan Chuah v. R.* (1955) M.L.J. 246.

(2) *Maqbool Singh Dhilion v. Public Prosecutor* (K.L.—Criminal Appeal No. 89 of 1955).

(3) *Begu v. Emperor* (1925), L.R. 52 I.A. 191; A.I.R. 1925 P.C. 130.

MAGISTRATE'S APPEAL.

A. N. Mitra for the appellant.

T. A. Mahony (Crown Counsel) for the respondent.

Taylor J.: —This appeal raises points of some importance in relation to the framing and amendment of charges.

The accused is a shopkeeper who had a substantial business for some years but at the material date he was in serious financial difficulties, a fact not then known to his neighbours.

On 19th February 1955, a Saturday, he went to a jeweller's and took a pair of diamond bracelets, worth over $4,000, on approval. On the same day he took a bracelet worth nearly $5,000 from another jeweller, on approval. On 21st he took another pair worth about $3,700 from a third shop, also on approval. On the 22nd he bargained with each jeweller for a small discount and completed the purchase. The sales were ostensibly for cash but in each case, by a feigned mistake as to the date, he induced the vendor to accept a cheque post-dated to the 24th. The state of his bank account was such that the accused could not possibly have thought that any of the cheques would be honoured unless, on the intervening day, he paid in a very substantial sum; his only possible hope of meeting them was to collect the balance alleged to be due to him on a very old account with a man in Kuala Lumpur. On 22nd he pledged all the jewellery to three separate pawnbrokers, to one of whom he gave a false name, and another a false address; he did not pay any part of the proceeds either into the bank or to the vendors. All the cheques were dishonoured. A few days later the accused went to Kuala Lumpur but failed to obtain any funds. Meantime the vendors had lodged complaints. The police traced the pledges. On 8th March the accused surrendered.

After various amendments, applications and other delays the case was brought to trial on 3rd October but the prosecution were still not properly ready and a final order for joinder of the three charges was not made until the second day. The accused was tried on three charges of cheating under section 420 of the Penal Code, each of which alleged that he obtained delivery of the jewellery by tendering a false cheque.

The trial proceeded and the accused adduced his own and other evidence most of which was directed to countering the inference that he had acted dishonestly by seeking to show that he had had a genuine expectation of obtaining funds from Kuala Lumpur and that he had a buyer from Indonesia for some of the jewellery.

Counsel for the defence then argued, as though it were a point of law, that "the deception must precede the delivery." For the present purpose it is sufficient to say that if a man took delivery of goods on a Saturday and no mention of any cheque was made until the following Tuesday, he did not obtain delivery by means of the cheque.

The case was not a simple one but all three transactions were remarkably alike in their details. Each case was a swindle in two stages. In the first stage the accused obtained the goods "on approval" which, whatever the actual words used may have been, was well understood between business men to mean sale or return within two or three days; in at least one case the following Monday was specified. In the second stage he never produced, or offered to return, the goods;

he purported to buy them. Ostensibly the sale was for cash, not on credit, the term "cash" including, for convenience, a spot cheque. In each instance express objection was taken to the cheque being postdated, even by two days, and each vendor was induced to accept it by a false representation that it would be met on the 24th. This did not convert the sale into a credit sale. It was an indulgence; giving time to pay a due debt is not the same thing as agreeing to give credit.

In each instance the first stage was a bare delivery, on trust, not on credit in the commercial sense. The second stage consisted of a sale, a purported payment by spot cheque, a feigned mistake as to the date of that day and, consequentially, in the date written on the cheque, detection of the mistake but not of the fact that it was feigned, a false excuse, a request for two days time to pay coupled with a false representation and the granting of time on the strength of that representation.

A variety of charges could have been framed but they must all have been on one of two bases, either obtaining delivery on the Saturday by some false representation not related to any cheque, or obtaining something other than delivery (e.g. consent to retention) on the Tuesday, by means of the cheque. Despite having had six months to study their case the prosecution fell between two stools. They charged the man with obtaining delivery by means of the cheques — the one thing which he clearly had not done.

This point was not taken, as it should have been, at the close of the case for the prosecution. After the defence, in his final reply, Counsel for the prosecution submitted that the offences proved were cheating under section 417 of the Code. The accused was convicted under that section, which carries a maximum punishment of imprisonment for one year, and was sentenced to eight months on each charge, consecutively. Section 420 provides for imprisonment up to seven years.

In his grounds of judgment the learned District Judge examined the facts with great care and accuracy of detail and stated his reasons for finding that the accused had acted dishonestly. He found that the accused had deceived each vendor on the 22nd, by falsely representing that he intended to pay for the bracelets and had thereby dishonestly induced the vendor's consent to his retaining them. The District Judge considered that this constituted an offence under section 417, that such an offence is "minor" as compared with one under section 420, and that he could therefore convict under section 417, without amending the charge, by virtue of section 168(2) of the Criminal Procedure Code.

On appeal it was argued for the prisoner, and conceded by the prosecution, that this view is erroneous but Crown Counsel submitted that the trial Court was authorised to convict of a "different" offence, without amendment, under section 166. Counsel for the appellant then cited *Lau Chuan Chuah*[1], where it was held in Penang that the identical section of the Straits Settlements Code does not apply to the lower Courts.

At this stage it was necessary, owing to the late hour, to adjourn to another day and meantime the Court became aware of Selangor Criminal Appeal No. 89 of 1955[2], not yet reported, in which a different view was taken. As the authorities are not in agreement I will state shortly my present opinion.

The fundamental principle is that the offence must be stated with sufficient precision to enable the accused to meet the charge. As regards cheating it is specifically enacted by section 153 that the manner in which the victim was cheated must be set out. It is the duty of the Court to scrutinise the charge at the commencement of every summary trial. An amendment may be made at any stage and, in general, the earlier the better but it is at the close of the evidence for the prosecution that the Court is in the best position to decide exactly what is the case which the accused is required to meet. It is therefore the express statutory duty of the lower Courts to consider every charge at that stage and if necessary to amend it then. This is a point of forensic procedure and quite apart from the legal provisions regarding the framing of charges which relate mainly to practice in the prosecutor's chambers. It is a mandatory provision which should always be strictly observed. In my view, however, it does not exclude either earlier or later amendment for particular reasons or conviction, in proper cases, of an offence not formally charged.

Some cases admit of a partial defence. The simplest example is the everyday Magistrate's case of a man who hits somebody with a billet of firewood and breaks his arm. The police always, and correctly, charge the man with voluntarily causing grievous hurt. There is seldom any reason to amend at the close of the prosecution. The defence may, however, raise a doubt as to whether the intention was to cause grievous, as distinct from simple, hurt. There is no point whatever in amending the charge at that stage. The charge informed the prisoner what he had to meet and he has already met it, with success on one point. The unrebutted residue, however, constitutes a complete offence. The Code provides that in such a case the Court can forthwith convict of the reduced offence without the formality of an amendment which at that stage would be quite useless to the accused. In short, every charge of a complex offence is deemed in law

to comprise a charge of any less complex offence constituted by some of the same particulars. In the section it is called a "minor offence" but this expression is used here in a special sense. It is not identical with "less serious". It means produced by deletion without other alteration. The maximum sentence for the comprised offence will usually be lighter but this is a separate result; lighter sentence is not the test.

In the present case the District Judge treated section 417 as "minor" to section 420. Both sections are complex; to a considerable extent they overlap but they are different in several respect. In some instances 417 might be "minor," in the special sense, to 420 but in this case the Court convicted of an offence composed of different particulars; this is not authorised by section 168. The false representation of which the accused was convicted was quite different from the one in the charge to which he had pleaded. The actual conviction could be supported only under some other provision.

Section 166, on which the Crown relied, deals with a completely different situation. At first sight it seems startling that a prisoner should be summarily convicted, without express notice, of an offence quite different from the one charged. The section does not mean that. Its apparently general terms must be understood as an exception of very limited scope, to the general rule. Its true meaning can be illustrated by the case of *Begu*[3], where five men were charged with murder and three of them were convicted, without amendment, under an identical section, of making away with the body. The gravamen of the case against the three appellants was that the fact of their making away with the body raised an inference that they took part in the murder. On final review of all the circumstances the Court found that though they had made away with the body they had not necessarily taken part in the murder. They were therefore acquitted of murder but convicted of the offence of concealing evidence. The Privy Council supported this conviction on the ground that they had been tried on evidence which brought the case within the section (165 in our present Code) which authorises the framing and trial together of any number of charges arising out of the same series of facts.

There are two main tests. First, the facts must be such that the unframed charge was available from the start and could have been framed and tried concurrently under section 165; secondly, the evidence must have been presented in such a way as to raise all the same issues of fact as would have been raised had the unframed charge been framed and trial claimed on it. Not only must the evidence for the prosecution be the same but the Court must be satisfied that the evidence for the defence would also have been the same.

Applying these tests to the present case, the unframed charge was available but it is not clear that the evidence relevant to it was fully elicited. The vendors never said, in terms, that they consented to the retention and the question whether giving a false cheque is proof of intention not to pay may be arguable. For these reasons the actual convictions could not be supported under section 166. The accused might have been convicted, under that section, of cheating within section 420 of the Penal Code by inducing delivery of the goods by deceit, the evidence of that part of the transactions being fuller and clearer but in my view this was not a good case for applying section 166 because the charges could, and should, have been amended by the trial Court at the close of the prosecution. The charges were therefore amended during the appeal and were explained to the accused who again claimed trial. His counsel then applied to recall three of the witnesses for further cross-examination, on the amended charges, as he would have been entitled to do at the trial. This was allowed. The three witnesses all lived near the Court; they were summoned during the luncheon interval and all were further cross-examined on the same day. Despite the lapse of a year, their evidence was still clear and consistent.

It should be emphasised that at no stage did counsel for the appellant attack the findings of the District Judge on the issue of dishonesty; all his arguments were on points of procedure and were aimed at securing a new trial. In my opinion the course adopted was much to be preferred from the point of view of the prisoner because it excluded any opportunity for the witnesses to refresh their memories by reference to record of their earlier statements, quite apart from important considerations of delay and expense.

In the result I was satisfied that the offences finally charged had been established, the accused having had ample opportunity to contest all the relevant issues of fact. He was therefore convicted. The three offences were part of a scheme, deliberately planned, skilfully executed and involving substantial sums. Concurrent sentences of two years imprisonment were imposed.

Sentence enhanced.

Solicitors: *S. C. Goho & Co.*